No. 6593

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LI BING SUN,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant respectfully petitions this Honorable Court for a rehearing of the above-entitled cause.

Briefly, the facts are: The appellant, a male Chinese, was first admitted to the United States by the immigration authorities on February 16, 1920. On November 22, 1929, he departed from the United States for China on a laborer's Return Certificate, which was issued by the immigration authorities upon proof that he had property in the United States to the amount of $1,000.00. In accordance with the terms of his return certificate, the appellant was required to return to the United States within one year from

the date of his departure, unless by reason of sickness or other disability beyond his control he was unable to return within one year. Returning to the United States from this trip, he departed from China on November 4, 1930, or eighteen days *prior* to the expiration of the one year period, and arrived in the United States on November 26, 1930, or four (4) days *after* the expiration of the one year period. He was excluded and ordered deported by the immigration authorities on the ground that he did not present an overtime certificate issued by an American Consular officer abroad showing that his absence from the United States for a period of four (4) days beyond the one (1) year period prescribed by his laborer's return certificate was caused by sickness or other disability beyond his control, although the appellant claimed that he had applied for such a certificate to an American Consular officer prior to his departure from China, but that this officer refused to issue the same.

As we interpret the rule laid down in the opinion filed, a Chinese alien, who has departed from the United States on a Laborer's Return Certificate, which has been issued under Section Six (6) of the Act of Congress of September 13, 1888 (8 U. S. C. A. Sec. 275), but who is unable to return to the United States within one year from the date of his departure therefrom by reason of sickness or other disability beyond his control, is entitled, as a matter of right, to obtain from the American Consular officer abroad an overtime certificate, *providing the application therefor is made after a year from the date of the alien's*

departure from the United States. The pertinent part of the Court's opinion is as follows:

> "The instant case is distinguished from the cases of Ex parte Yee Gee, 17 Fed. (2d) 653, and Ex parte Woo Show How, 17 Fed. (2d) 652. Therein the petitioners applied for overtime certificates after a year from their departure from the United States had expired. The district courts held, and rightly we think, that the consuls should have issued the certificates and left the final decision to the immigration authorities in the United States. Here the appellant applied for an overtime certificate before the time legally allowed him had expired and we think the consul acted correctly in refusing to issue a certificate, or rather in refusing to issue a certificate, or rather in refusing to issue what would have been assurance of favorable action on an overtime certificate."

Thus, in the case at bar, the Court held that the application for an overtime certificate, being made *prior* to the expiration of the one year period from the date of his departure from the United States, was premature and that, therefore, there was no duty imposed upon the American Consular officer to issue such a document.

We do not question the correctness of the rule laid down and, in fact, we now freely concede that it is the only rule possible under the applicable statute, which provides, in part, as follows:

> "The right to return under the said certificate (Laborer's Return Certificate) shall be limited to one year; but it may be extended for an addi-

> tional period, not to exceed a year, in cases where, by reason of sickness or other cause of disability beyond his control, the holder thereof shall be rendered unable sooner to return, which facts shall be fully reported to and investigated by the consular representative of the United States at the port or place from which such laborer departs for the United States, * * *."
>
> (8 *U. S. C. A.* Sec. 277.)

Manifestly, a different ruling would permit a laborer to apply for an overtime certificate at a time far in advance and would require the consular officer to investigate the facts of his alleged disability and to certify whether or not the same *rendered* the laborer unable to return within the one year period, although the one year period might not expire for several months.

However, we earnestly believe that the adoption of the rule requires an interpretation of the statute in respect to reckoning the time allowed for the laborer's return to the United States. In other words, does the word "return," as used in the statute, mean that the laborer must actually be in the United States within one year from the date of his departure therefrom or does it mean only that he shall be bound for the United States at the expiration of the one year period?

Webster defines the word "return" as "to turn back; to go or come again to the same place." Hence, in the one instance, a "return" may be said to be made at the point of the journey where one turns back or is homeward bound; in the other instance, a

"return" may be said to be made at the point where the journey actually commenced or originated. However, entirely aside from the adequacy of, at least, one of its accepted definitions, we respectfully submit that the rule adopted, as to the time when an application may be made to an American consular officer for an overtime certificate, fully impels the conclusion that the word "return" shall be construed with respect to the time when the laborer is bound for the United States, rather than in respect to the time when he actually enters the United States.

In the case of *Ex parte Yee Gee,* 17 Fed. (2d) 653, which has been expressly approved by this Honorable Court in the case at bar, it was expressly held that the expiration of the time limit of the laborer's return certificate became of little consequence where the facts showed that the laborer was actually bound for the United States *before* the expiration of the time limit. Quoting from the case cited, at page 657:

> "* * * The expiration of the time limit, under the circumstances here, applicant has made every effort to secure his document on which to take passage, and where he was actually on an American ship bound for his return port before the expiration of the time limit, becomes of little consequence, * * *."

The consular overtime certificate is obviously intended not only as a benefit to the laborer to lessen the burden of proof placed upon him to establish his disability, but, also, as a guide and protection to the immigration authorities against fraudulent claims of disability. However, if a laborer be absolutely unable

to travel at a time when it would ordinarily be possible for him to reach the United States within the one year period, but able to travel before the expiration of the time limit, although too late to reach the United States, we submit that unjust and absurd results will follow in the event that the word "return" be construed to mean the time of his actual arrival in the United States; if he commence his homeward journey at the time when he is able to travel, as he ordinarily and reasonably would be expected and required to do, he will not be able to enter, at least, his ability to establish his right of entry will be seriously handicapped, because of the lack of a certificate, which it was impossible for him to obtain; yet, if he merely linger abroad from the time when he is able to travel until the expiration of the one year period, he will be in a position to obtain the certificate. It does not seem reasonable that Congress contemplated to discriminate in favor of one who lingers abroad, when he is able to travel, in order to obtain the consular certificate, over one who endeavors to shorten his absence from the United States as much as possible by commencing his homeward journey as soon as he is able to travel.

If, however, the word "return" be construed to mean the time when the laborer turns back to or is bound for the United States, there will be no such unfair or unreasonable discrimination as suggested. The laborer, who commences his journey as soon as he is able to travel and who is actually *bound* for the United States at the expiration of the one year period prescribed by his return certificate, will need no con-

sular overtime certificate, because he has returned within the time limit. As a result, the laborer, who lingers abroad from the time that he is able to travel until the expiration of the one year period, for no reason at all, except to obtain the consular overtime certificate, will be entirely eliminated from the picture, and, thus, full effect will be given to the intention of Congress that a laborer's absence from the United States shall not be unduly prolonged.

In *Stockyards Loan Company v. Nichols,* 245 Fed. 511, C. C. A. 8th, at page 516, it is said:

> "In order to ascertain the intention of the Legislature * * *, the court may look to each part of the statute, to other statutes upon the same or related subjects, to the old law upon the subject, to the evils and mischiefs to be remedied, and to the natural or absurd consequences of any particular interpretation. (Cases cited.)"
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> *Church of the Holy Trinity v. U. S.,* 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226;
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> *Lau Ow Bew v. U. S.,* 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340;
>
> *U. S. v. Gue Lim,* 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544.

In the case of *In re Ah Quan,* 21 Fed. 182, the Court said:

> "The act imposes a duty and obligation on the government, through the Collector, correlative and precedent to the obligation imposed upon the Chinese laborer to produce the prescribed certificate, and the obligation of the latter to produce the certificate necessarily arises subsequently to, and is dependent upon, the performance of the

correlative and precedent duty and obligation on the part of the government to furnish it. To hold that Congress intended to require the performance of the dependent obligation on the part of the Chinese laborer until the government has discharged its correlative and precedent duty and obligation upon which his obligation rests, imposed by the act, by furnishing the certificate and thereby rendering it possible for him to produce it, would be to attribute to Congress a deliberate intent to enact a palpable and glaring absurdity, thereby violating one of the most venerable canons of statutory construction, that a statute must not be so construed as to lead to an absurd conclusion. We must conclude, therefore, that it was not intended to require the production of the certificate by those who departed from the country before it was possible to obtain it. And that Congress did not intend to exclude such Chinese laborers as were in this country at the time mentioned is clearly manifest, because it has said so in express terms in the provision of section 3, 'that the two foregoing sections (excluding Chinese laborers) shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, 1880,' etc. It is clear, from the necessities of the case, that this section is only applicable to those who departed after the act, and who had the opportunity to procure the certificate. To hold otherwise would be to render this clause, making the impossible certificate the only evidence as to those who had departed before the passage of the act, absolutely inconsistent with the clause of section 3 referred to, that the preceding sections 'shall not apply to Chinese laborers who were in the

United States' at the designated period, and render that provision wholly nugatory, as well as to violate the treaty which the act professes to execute and not to abrogate. The different provisions of the statute must be so construed, if possible, that they can stand together, and not so as to nullify each other."

Chew Heong v. U. S., 112 U. S. 536, 5 Sup. Ct. 255, 28 L. Ed. 770;

In re Low Yam Chow, 13 Fed. 605;

In re Chin Ah On, 18 Fed. 506;

In re Leong Yick Dew, 19 Fed. 490.

We, therefore, respectfully submit that as long as it is impossible for a Chinese laborer to obtain a consular overtime certificate until the one year period prescribed by his return certificate has expired, it is proper and necessary, in order to be consistent and to avoid unjust and unreasonable consequences, to reckon the time allowed for his return under the return certificate with respect to the time when he is actually bound for the United States, rather than with respect to the time of his actual arrival or entry in the United States.

It is established, in fact, expressly conceded, that the appellant departed from China on his homeward journey to the United States on November 4, 1930, or eighteen days prior to the expiration of the one year period prescribed by his return certificate. As long as he was, therefore, bound for the United States at the expiration of the time limit, it will follow that his return was made within the time limit.

The Court is at liberty to draw its own conclusions from the established facts. In *Weedin v. Mon Him,* 4 Fed. (2d) 533, at page 534, C. C. A. 9th, it is said:

> "* * *. In disposing of the question of the appellee's right to enter the United States we are not confined to a consideration of the grounds on which he was excluded by the local authorities; we may properly advert to other ground on which as matter of law that conclusion would follow."

We respectfully ask that the petition for a rehearing be granted.

Dated, San Francisco,
April 23, 1932.

STEPHEN M. WHITE,
Attorney for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
April 23, 1932.

STEPHEN M. WHITE,
Counsel for Appellant and Petitioner.